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SUPREME COURT, U.S.

NO. 08-52

IN THE
SUPREME COURT OF THE UNITED STATES

ROBERT STEINBUCH,

Petitioner,

v.

HYPERION BOOKS,
DISNEY PUBLISHING WORLDWIDE,
and
HOME BOX OFFICE,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITIONER'S REPLY TO BRIEF IN OPPOSITION FOR RESPONDENTS HYPERION BOOKS AND DISNEY PUBLISHING WORLDWIDE AND SUPPLEMENTAL BRIEF [COMBINED]

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QUESTIONS PRESENTED FOR REVIEW [CORRECTED]

Respondent has noted Petitioner's counsel's error in misidentification of the Sixth Circuit's decision in *Theunissen v. Matthews* as a decision of the Third Circuit. Because the error implicates the extent of the split in circuits warranting this Court's review, Petitioner restates the Questions Presented for Review to correct the error in designation and typographical error in citation to the case.

I. [CORRECTED]

WHETHER PETITIONER WAS DENIED HIS RIGHT TO RELY ON THE ARKANSAS LONG-ARM JURISDICTION STATUTE IN HIS DIVERSITY ACTION AGAINST DISNEY PUBLISHING WORLDWIDE BASED ON DISNEY'S SELF-SERVING AFFIDAVIT DENYING ALL JURISDICTIONAL FACTS WITHOUT BEING AFFORDED ANY OPPORTUNITY FOR JURISDICTIONAL DISCOVERY TO REBUT THAT AFFIDAVIT, IN CONFLICT WITH DECISIONS OF THE SIXTH CIRCUIT IN *THEUNISSEN v. MATTHEWS*, 935 F.3d 1454, 1459 (6th Cir. 1994) AND *COMPUSERVE INC. v. PATTERSON*, 89 F.3d 1657, 1626 (6th Cir. 1996).

II.

WHETHER THE EIGHTH CIRCUIT ERRED IN ONLY REMANDING FOR JURISDICTIONAL DISCOVERY ON THE THEORY OF GENERAL JURISDICTION, BASED ON ITS CONCLUSION THAT STEINBUCH COULD NOT ASSERT SPECIFIC JURISDICTION BECAUSE HE WAS NOT A RESIDENT OF ARKANSAS AND FINDING THAT STEINBUCH HAD NOT YET SHOWED GENERAL JURISDICTION OVER HYPERION, AS THE DECISION IS WHOLLY CONTRARY TO *KEETON v. HUSTLER, INC.*, 465 U.S. 770 (1984).

III.

THE EIGHTH CIRCUIT ERRED IN UPHOLDING DISMISSAL OF PETITIONER'S ACTION AGAINST HOME BOX OFFICE (HBO) FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF COULD BE GRANTED WHERE PETITIONER SUED FOR INJUNCTIVE RELIEF TO PREVENT HBO FROM PRODUCING AND AIRING A TELEVISION SERIES BASED ON *THE WASHINGTONIENNE* THAT WOULD EXPOSE HIM TO FURTHER VIOLATIONS OF HIS RIGHT OF PRIVACY.

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PETITIONER'S COMBINED REPLY BRIEF AND SUPPLEMENTAL BRIEF

Petitioner Robert Steinbuch files this combined reply brief and supplemental brief pursuant to sections 5, 6 and 8 of Rule 15 of the Rules of this Court. Petitioner's reply is addressed to the Brief in Opposition filed on behalf of Respondents Hyperion Books and Disney Worldwide Publishing. Petitioner's supplemental brief references "intervening matter" relevant to the third Question Presented relating to his claim against Respondent Home Box Office.

I. [CORRECTED]

PETITIONER WAS DENIED HIS RIGHT TO RELY ON THE ARKANSAS LONG-ARM JURISDICTION STATUTE IN HIS DIVERSITY ACTION AGAINST DISNEY PUBLISHING WORLDWIDE BASED ON DISNEY'S SELF-SERVING AFFIDAVIT DENYING ALL JURISDICTIONAL FACTS WITHOUT BEING AFFORDED ANY OPPORTUNITY FOR JURISDICTIONAL DISCOVERY TO REBUT THAT AFFIDAVIT, IN CONFLICT WITH DECISIONS OF THE SIXTH CIRCUIT IN *THEUNISSEN v. MATTHEWS*, 935 F.3d 1454, 1459 (6th Cir. 1994) AND *COMPUSERVE INC. v. PATTERSON*, 89 F.3d 1657, 1626 (6th Cir. 1996).

At the outset, Petitioner recognizes the correction noted by Respondent to his reference to the decision of the Sixth Circuit in *Theunissen v. Matthew*, 935 F.2d 1454 (6th Cir. 1991). Petitioner incorrectly identified this as a decision rendered by the Third Circuit, while the citation in the argument section of his petition appears to be correct in identifying the Sixth Circuit as the court issuing the opinion. However, Petitioner also notes that both the reference to the Third Circuit and the citation to the case in the Question Presented are incorrect. Petitioner concedes that the error in the first question presented and in his discussion of the case in the argument are not merely technical mistakes because he has relied on *Theunissen* in support of his discussion of the still existing circuit split. In fact, the corrected reference supports an argument that the Eighth Circuit's holding below is only in conflict with the Sixth Circuit's position.

A. The circuit split

The plaintiffs' affidavits noted by the court in *Theunissen* and *CompuServe, Inc. v. Patterson*, 89 F.3d 1257 (6th Cir. 1996) were necessary to show that the non-residents actually conducted business in the forum, i.e., establishing general jurisdiction, rather than simply relying on the factual allegations in their pleadings. *Theunissen*, 935 F.2d at 1458. Here, Petitioner's allegations and evidence were sufficient to demonstrate that the threshold for jurisdiction against Disney was

met as the District Court found: "Steinbuch is an Arkansas resident. Hyperion, Disney, HBO and Warner sell their products or services in this state." [Order, at 9]. The issue here, rather, was whether Steinbuch is required to provide affidavit evidence that Disney committed the torts in question.

The issue here, rather, is whether Steinbuch was required to provide affidavit evidence that Disney committed the torts in question. The courts below essentially required Petitioner to offer a personal affidavit—rejecting the aforedescribed public and other data about Disney's involvement—to counter the self-serving affidavits of Disney and Hyperion claiming that Disney was not involved in the production of the book. How could he possibly do so when the District Court prevented Steinbuch from taking any discovery whatsoever?

The Sixth Circuit cautioned against relying on self-serving affidavits "to prevent non-resident defendants from regularly avoiding personal jurisdiction simply by filing an affidavit denying all jurisdictional facts." 935 F.2d at 1459. Later, in *CompuServe*, that court reiterated this view, holding that dismissal for lack of jurisdiction is proper "only if all the specific facts which the plaintiff (CompuServe) alleges collectively fail to state a prima facie case for jurisdiction." 89 F.3d at 1262.

The District Court's key finding was: "Jurisdiction over Disney does not automatically follow because of the actions of its wholly-owned subsidiary." [Order, at 13]. In concluding that Petitioner had failed to meet his burden of producing controverting evidence on the question of jurisdiction, the court noted:

> Disney produced an affidavit from its senior vice president stating that Disney is the parent of Buena Vista Books and does not control the business operations and affairs of Buena Vista Books. The affidavit further states that Disney did not publish *The Washingtonienne*, did not enter into a contract with Cutler, never paid Cutler, and had nothing to do with distribution of the book.

[Order, at 13]. Although Respondent's counsel also represented Cutler in the trial court, it did not provide an affidavit from her denying any relationship or transaction with Disney.

The Eighth Circuit found that Petitioner's evidence failed to demonstrate that Disney had any connection with the dispute because there was no "credible" evidence showing that it played any role in the publication or distribution of the book. *Steinbuch v. Cutler, et al*, 518 F.3d 580, 590 (8th Cir. 2008). But Petitioner did provide such evidence from public sources and was deprived of any opportunity to further

develop this evidence because the District Court stayed all discovery pending disposition of Respondent's Motion to Dismiss.

Indeed, Steinbuch offered significant documentary evidence that Disney was involved in the publication and marketing of Cutler's book. He provided publicly available information including newspaper articles from national and international publications or internet sites all indicating that Disney was involved in the production tortious book subject to this suit. The publications included: *Cleveland Plain Dealer; The Agora* (Salon.com); *Hartford Courant; The Post-Standard* (Syracuse, New York); *The Mercury* (Australia); *The New York Times; The Observer* (Guardian Newspapers). [Exhibit 1 to Plaintiff's brief in opposition to Defendants' Motions to Dismiss]. This provided prima facie evidence of Disney's involvement in the tortious behavior, but the District Court rejected it on the grounds that newspapers are not generally admissible. The record also included a copy of Hyperion's contract with Defendant Cutler, and Buena Vista's distribution agreement with Time Warner that references both Hyperion and Disney. Nevertheless, at the same time, the District Court prevented the Petitioner from further developing evidence through its order staying all discovery.

Unlike the factual issues in *Theunissen* and *Compu-*

Serve, in which the plaintiffs' supporting evidence was necessary to show that non-resident defendants had intentionally penetrated local markets—issues upon which those plaintiffs logically could have provided affidavits on personal knowledge, the unresolved issue in Petitioner's case did not involve Disney's actual conduct of business in Arkansas at all. That finding had been made by the District Court. Rather, the unresolved issue focused on Disney's relationship with its wholly-owned subsidiary, Hyperion. The court below, as Respondent notes [BIO, 14-15], rejected Petitioner's supporting evidence because the newspaper articles did not "directly" refute Disney's affidavit and the publication agreement limited its terms to Hyperion's publications.

The burden imposed on Petitioner by the lower courts would be virtually impossible for any plaintiff to discharge where the non-resident corporation's affidavit asserts facts relating to the operations and management of the parent and subsidiary companies that is not within the personal knowledge of the plaintiff. Here, Petitioner's inability to controvert the self-serving claims of Disney and Hyperion regarding their internal business relationship beyond the publicly available evidence that he presented due to the stay of discovery presents an insurmountable *Catch-22*.

The denial of any discovery opportunity functionally prevented Petitioner from controverting the allegation that Hyperion functions entirely independently

of its parent, Disney. It is in this sense, that the Eighth Circuit diverges from the holdings of *Theunissen* and *CompuServe*. In Petitioner's case, the lower courts did precisely what the Sixth Circuit warned against in permitting Disney to escape jurisdiction without affording Steinbuch a reasonable opportunity to further develop controverting evidence through jurisdictional discovery.

B. "Failure" to seek jurisdictional discovery

The Eighth Circuit found that Petitioner had not sought to engage in jurisdictional discovery:

> Defendants asked the court to stay discovery pending its ruling on their dismissal motions because they wanted to avoid potentially broad discovery requests and the risk of waiving their jurisdictional claims before their motions were ruled on. Steinbuch filed a motion opposing a stay of discovery; the motion made no explicit request to conduct limited discovery tailored to the specific issue of personal jurisdiction. The district court allowed Steingbuch an extension of about two months to file his reply [to the dismissal motions] but granted the defense motion to stay discovery until ruling on the motions.

Steinbuch, 518 F.3d at 584-85.

In fact, however, Steinbuch had expressly argued his need for discovery to develop jurisdictional facts in his response to Respondent's motion for stay:

> . . . Steinbuch has not had the opportunity to take any discovery whatsoever, and one obvious area for required discovery is regarding Defendant's claims as to why this case should be dismissed. *See e.g., PST Services, Inc. v. Larson*, 221 F.R.D. 33, 37 (N.D.N.Y. 2004) (discovery permitted for plaintiffs that have made sufficient start toward establishing jurisdiction and have shown that their position is not frivolous); *Greenery Rehabilitation Group, Inc. v. Sabol*, 841 F. Supp. 58, 62 (N.D.N.Y. 1993) ("in a motion to dismiss pursuant to Rule 12(b)(1) for lack of subject matter jurisdiction, the part opposing the motion must be allowed discovery of facts demonstrating jurisdiction").

[Plaintiff's Response to Defendants' Motion to Stay Discovery, at 3]. The motion for stay was filed on August 30, 2006. Steinbuch filed his response on September 10, 2006. The trial court granted the motion and ordered a stay of "[A]ll discovery" on the following day, September 11, 2006.

Petitioner clearly indicated his need for jurisdictional discovery in his response to the motion to stay and the trial court presumably considered his response before ordering the stay. In essentially holding

that Petitioner had a further duty to request jurisdictional discovery after the trial court had rejected his initial request, the Eighth Circuit imposed a duty upon him that is, to Petitioner's knowledge, neither required, nor recognized by the federal rules.

I.

THE EIGHTH CIRCUIT ERRED IN ONLY REMANDING FOR JURISDICTIONAL DISCOVERY ON THE THEORY OF GENERAL JURISDICTION, BASED ON ITS CONCLUSION THAT STEINBUCH COULD NOT ASSERT SPECIFIC JURISDICTION BECAUSE HE WAS NOT A RESIDENT OF ARKANSAS AND FINDING THAT STEINBUCH HAD NOT YET SHOWED GENERAL JURISDICTION OVER HYPERION, AS THE DECISION IS WHOLLY CONTRARY TO *KEETON v. HUSTLER, INC.*, 465 U.S. 770 (1984).

Respondent argues that Petitioner has relied on a "simple stream of commerce theory" in arguing that the lower courts improperly failed to hold that he had shown sufficient evidence to establish general jurisdiction over non-resident defendant Hyperion. [BIO, at 11,16]. But this is a not a case in which Petitioner sought to assert long-arm jurisdiction over a supplier or manufacturer of a product sold to a distributor which then puts the product into interstate commerce, resulting in its purchase for retail sale by a retailer within the forum

state.

Instead, Hyperion deliberately published *The Wasingtonienne*, aware that Petitioner had already sued the author, Cutler, for disclosures on her website in the District of Columbia. Hyperion entered into a distribution agreement providing for a national marketing campaign that clearly included Arkansas. And Petitioner established that *The Washingtonienne* was listed with other Hyperion titles in Arkansas bookstores; had been purchased by bookstores within the state; and was available through the Central Arkansas Public Library system.

The continuing business operations of Hyperion in Arkansas through the distribution of its titles for sale in the state reflects precisely the type of continuous and systematic contacts with the state warranting the exercise of long-arm jurisdiction. *Heliocopteros Nacionales de Columbia, S.A. v. Hall*, 466 U.S. 408, 415 (1984). It is the type of ongoing enterprise activity that led this Court to uphold assertion of jurisdiction over the non-resident publisher in *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770 (1984).

Moreover, Respondent's reliance on *Calder v. Jones*, 465 U.S. 783 (1984) is misplaced because there, the non-resident defendants were individual employees of the offending publication who themselves had no ties to the

forum state. *Id.* at 784-85. Instead, the publication, The Enquirer, was distributed in California, and carried an article allegedly libelous. These employees, the reporter and editor had not deliberately engaged in any activity targeting the plaintiff as a resident of California. The situation in *Calder* is not comparable to the theory of jurisdiction considered in *Keeton*, or here, where Petitioner has sued the non-resident corporate entities based on their ongoing business activity within the state.

III.

THE EIGHTH CIRCUIT ERRED IN UPHOLDING DISMISSAL OF PETITIONER'S ACTION AGAINST HOME BOX OFFICE (HBO) FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF COULD BE GRANTED WHERE PETITIONER SUED FOR INJUNCTIVE RELIEF TO PREVENT HBO FROM PRODUCING AND AIRING A TELEVISION SERIES BASED ON *THE WASHINGTONIENNE* THAT WOULD EXPOSE HIM TO FURTHER VIOLATIONS OF HIS RIGHT OF PRIVACY.

The Eighth Circuit upheld dismissal of Steinbuch's claim for invasion of privacy and request for injunctive relief based the lower courts' conclusion that he could not demonstrate that HBO had actually produced any material, despite its concession that it had purchased the rights to the Disney/Hyperion book, *The Washingtonienne*. The court found:

> HBO concedes that it has acquired an option to develop a television series based on Cutler's novel but asserts that it has not published anything whatsovever about Steinbuch and thus has not invaded his privacy or caused injury.

518 F.3d at 591. Thus, it concluded that Steinbuch's claim was merely speculative:

> Steinbuch merely speculates that HBO might injure his privacy rights at some time in the future, and its parent corporation Time Warner is not even mentioned in the body of the complaint. (citation omitted) In light of the complaint's failure to allege a colorable claim against HBO and Time Warner, there would be no basis for injunctive relief against the mere possibility of a future television series based on Cutler's novel.

Id. Steinbuch's issue here focuses on the trial court's stay of discovery that deprived him of any opportunity to question the potential progress of the development of the HBO series.

In fact, however, recent public developments demonstrate that Steinbuch's concerns about HBO's intentions and progress were not speculative at all:

The WashingtonPost.com reported on July 11, 2008 that on July 10th, the same date as the due date for Steinbuch's cert petition, HBO had announced that its

Washingtonienne project was going forward:

> To that end, they've [HBO]given Sarah Jessica Parker's production company the thumbs up to make a pilot for an adaptation of the non-somber "Washingtonienne" novel. It's from former congressional staff assistant Jessica Cutler and was based on her blog of that same name, in which she detailed her interesting life in D.C., including an exhausting array of sexual encounters, some with government suits, some for cash because "how can anybody live on $25K/year?"

Lisa de Moraes, HBO Sees at Least One Big Picture (and Plenty of Shows) in its Future, The TV Column, WashingtonPost.com, July 11, 2008, Available at http://www.washingtonpost.com/wp-dyn/content/article/2008/07/10/AR20008071002890_html?referrer=emailarticle&sid=ST2000807103334&pos= (last visited, Aug. 20, 2008).

Similar reports appeared throughout the national news and entertainment press. *See e.g.*, Stuart Levine, Scorcese, Simon get HBO greenlights; Parker to exec produce "Washingtonienne," Variety.com (July 10, 2008) Available at http://www.variety.com/article/VR1117988772.html?categoryid=1300&cs=1 (last visited Aug. 20, 2008) (". . . the paybox is about to begin lensing the half-hour comedy

pilot . . . based on [Cutler's] sex life with real life figures on the D.C. political scene. Sarah Jessica Parker is exec producing and shooting will begin in the fall."); Bryan Stelter, HBO Orders Three Pilots, Including One Set in Post-Katrina New Orleans, NYTimes.com TVDecoder Blog (July 11, 2008), Available at http://tvdecoder.blogs.nytimes.com/tag/tca (last visited August 20, 2008); Lacey Rose, Welcome to HBO's Next Chapter, Forbes.com (July 11, 2008), Available at http://www.forbes.com/2008/07/11/hollywood-hbo-sopranos-bix-media-cx_lr_0711hbo.html (last visited Aug. 20, 2008) ("Included in the now 'embarrassment of riches,' as HBO co-president Plepler has dubbed the network's subsequent pipeline, is . . . *The Washingtonienne*, a Sarah Jessica Parker-produced Washington, D.C. comedy, based on Jessica Cutler's book. . ."); Claire Malone, Washington sex coming to HBO, Georgetown Voice/Vox Populi (July 11, 2008), Available at http://blog.georgetownvoice.com/2008/07/11/washington-sex-coming-to-hbo/ (last visited Aug. 20, 2008) ("HBO has just announced that it will shortly begin the filming of a pilot episoe for Washingtonienne, a TV series based upon former Senate staffer Jessica Cutler's District sexploits, which she so prudently parlayed into a chick-lit novel. The buzz promises to basically be a new *Sex and the City*."); and Kimberly Nordyke and James Hibberd, HBO orders pilots from Scorcese, "Wire" Creator, MSNBC.com (July 11, 2008) Available at http://www.msnbc.msn.com/id/2564671/ (last visited Aug. 20, 2008).

What these media sources show is that HBO was involved in the production of the television series throughout the course of the litigation in the courts below, yet Steinbuch was precluded from developing evidence of its activities as a result of the trial court's order staying all discovery. Steinbuch was not able to offer the type of evidence rebutting the argument that his claims were speculative by virtue of the denial of any opportunity to engage in discovery designed to remedy precisely the problem of proof noted by the courts below.

At this point it should be apparent that his cause of action is neither speculative, nor based on the possibility that his privacy rights will be injured "at some time in the future." For the protection of those privacy rights, that future is clearly now.

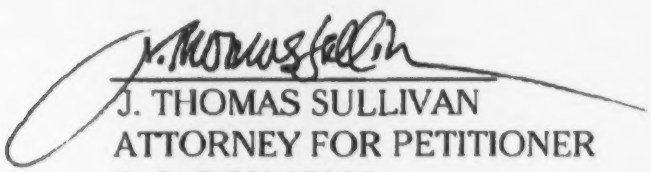
CONCLUSION

The trial court abused its discretion in denying Petitioner the opportunity to engage in discovery that would have permitted a fair opportunity for him to develop the very evidence the lower courts found lacking in his case. Moreover, the decision of the Eighth Circuit upholding the dismissal of his claims reflects an improper reliance on the self-serving affidavit of Disney and failure to properly apply *Keeton v. Hustler* in holding finding that he has yet to demonstrate sufficient contacts to warrant exercise of long-arm jurisdiction over

Hyperion. Finally, the newly-available evidence of HBO's development of the television series based on *The Washingtonienne* offered in this supplemental filing demonstrates the prejudice suffered by Petitioner as a result of the District Court's denial of discovery frustrating his ability to develop additional evidence to show that his cause of action had matured for purposes of his claim for injunctive relief to prevent further injury.

Petitioner prays the Court grant the petition and reverse the judgment of the court below.

Respectfully submitted,



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